



Commission Order to Clarify and Reaffirm
the VoIP Symmetry Rule:
47 C.F.R. § 51.913(b)

October 30, 2014

Kyle Bertrand
Vice President
Network Planning & Regulatory
Broadvox-CLEC, LLC

James C. Falvey, Esq.
Eckert Seamans Cherin & Mellott
1717 Pennsylvania Ave., NW
12th Floor
Washington, D.C. 20006

The Commission's Ruling Must be Retroactive to the Effective Date of the VoIP Symmetry Rule

- The VoIP Symmetry Rule was the *only* issue that AT&T appealed in the *Connect America Fund* Appeal
- AT&T lost on appeal at the 10th Circuit
- AT&T and Verizon are trying to re-litigate this issue before the Commission but the Commission has already made it clear that end office charges are due for Over the Top (OTT) traffic
- Because AT&T and Verizon are filing disputes based on their unique and inaccurate interpretation of the VoIP Symmetry Rule, the Commission needs to clarify that rule as requested by Level 3 (*see* 2/28/14 ex parte letter) and such clarification must be retroactive to the effective date of the Rule

Broadvox-CLEC, LLC v. AT&T Corp.

Case No. 8:13-CV-01130 (D. Md.)

- Broadvox filed a collections action against AT&T Corp. in April 2013 in federal court to collect its unpaid access charges
- Broadvox is seeking to collect its past due charges in federal court and not through FCC Enforcement or any other mechanism
- At the Court's request, the parties recently briefed whether a primary jurisdiction referral would be appropriate
- Without near-term reaffirmation and clarification of the VoIP Symmetry Rule, AT&T's illegal withholding of Broadvox's access charges dating back to January 2012 could extend for years into the future
- By issuing a clarification order, the Commission would eliminate the ability of AT&T and Verizon to continue to misread the VoIP Symmetry Rule and withhold millions of dollars from their much smaller competitors

Prospective-Only Application Would be Devastating for Over the Top Providers like Broadvox

- Broadvox would be devastated by a ruling that the requested reaffirmation and clarification has prospective effect only
- Broadvox has over \$7M in retrospective billings at stake
- AT&T would be rewarded for its three-year self-help campaign
- Self help has been discouraged by the Commission (*CAF Order*, ¶ 700)
- If AT&T had an issue with the VoIP Symmetry Rule, it should have come to the Commission for clarification rather than exercising self help

Retroactivity is the Norm in Agency Adjudications

- Retroactivity is the norm in agency adjudications. *AT&T v. FCC*, 454 F.3d 329, 332 (D.C. Cir. 2006)
- The Commission's Order will not change settled or established law (*Id.*)
- The disputes AT&T had with six or more carriers meant that AT&T could not reasonably rely on its novel interpretation of the VoIP Symmetry Rule. *Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1111 (D.C. Cir. 2001) ("Because the object of the [petitioners'] reliance was neither settled . . . nor 'well-established,' we are skeptical that retroactive liability against the [petitioners] would actually impose a manifest injustice.")
- AT&T and Verizon knew that the Commission might find that their interpretation of the Rule is completely contrary to the Commission's intention and would then apply the presumption of retroactivity. *Qwest v. FCC*, 509 F.3d 531, 540 (D.C. Cir. 2007) ("The mere possibility that a party may have relied on its own (rather convenient) assumption that unclear law would ultimately be resolved in its favor is insufficient to defeat the presumption of retroactivity when that law is finally clarified.")

Verizon's Conduct Demonstrates That It Initially Interpreted the VoIP Symmetry Rule Like Broadvox

- AT&T and Verizon cannot claim that the VoIP Symmetry Rule read clearly in their favor because for years Verizon interpreted it like Broadvox
- Verizon paid Broadvox's end office charges for services rendered for two whole years from January 2012 through January 2014
- Verizon also paid Bandwidth's charges during the same two-year period (Bandwidth 10/22 ex parte letter, at 6)
- It appears that Verizon only began disputing end office switching after it became aware of AT&T's self-help campaign
- AT&T and Verizon cannot claim that the VoIP Symmetry Rule clearly required denial of end office charges to OTT providers
- If there was any ambiguity in the VoIP Symmetry Rule's application to end office switching charges, clarification of that ambiguity must be retroactive to the effective date of the Rule